SUPREME COURT, U. S.

APR 30 1974

MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1633

TIMOTHY O'CONNELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner Timothy O'Connell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on February 1, 1974.

OPINIONS BELOW

The opinions of the Supreme Court of Ohio and of the Court of Appeals, First Appellate District of Ohio appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Ohio, First Appellate District, was entered on October 1, 1973 affirm-

ing petitioner's conviction dated January 31, 1973. The Supreme Court of Ohio affirmed conviction on February 1, 1974 and this petition of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the prosecution can use an alleged confession stemming from questioning initiated by a law eforcement officer after a person has been taken into custody when the prosecution did not demonstrate the use of procedural safeguards enumerated in the *Miranda* v. *Arizona* decision and effective to secure the Fifth Amendment's privilege against self-incrimination.

2. Whether it is a denial of due process to exclude circumstantial evidence; liability coverage, car damage, and a newspaper report of weather conditions; where this evidence would illuminate the central issue in the case whether the accused had knowledge that an accident had occurred.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code

§ 4549.02 Stopping after accident; exchange of identity and vehicle registration.

In case of accident to or collision with persons or property upon any of the public roads or highways, due to the driving or operation thereon of any motor vehicle, the person so driving or operating such motor vehicle, having knowledge of such accident or collision, shall immediately stop his motor vehicle at the scene of such accident or collision until he has given his name and address.

STATEMENT OF THE CASE

On December 11, 1972 an alleged car accident occurred on Colerain Avenue, Hamilton County, Ohio involving the accused driving a Ford Pinto in southerly direction and Mary Jo Mulholland driving a Volkswagen in a southerly direction. Miss Mulholland's vehicle was touched on the left door by the right rear side of the other vehicle which continued along Colerain Avenue without stopping after contact had been made. A Deputy County Sheriff happened upon the scene, identified the License Plate Number as the accused's and apprehended the accused outside his residence approximately one hour and a half after the alleged accident. The defendant denied being in an accident but the policeman without giving the defendant the Miranda warings as to his constitutonal rights cited the defendant to Hamilton County Municipal Court for leaving the scene of an accident, 4549.02 Ohio Revised Code.

HOW FEDERAL QUESTION IS PRESENTED

Although the police officer testified at the trial that the defendant "was not even aware of what was going on" he introduced over defendant's objection and denial an alleged oral confession which tended to indicate that the defendant had knowledge that an accident occurred.

Secondly, the defendant attempted to introduce circumstantial evidence; such as the amount of automobile damage, liability insurance coverage, and a newspaper report on the extraordinary number of accidents on that subject night; as relevant to the question whether a reasonable man would have knowledge of such an accident. Although the case was tried without a jury the court denied these proffers of evidence.

The Court of Appeals of Ohio affirmed conviction on that basis that the *Miranda* ruling as to confessions does not extend to misdemeanor cases in Ohio. *State* v. *Pyle,* 19 Ohio St. 2d 64. It further stated that the denial of defendant's proffer of circumstancial evidence was not prejudicial.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE FEDERAL STANDARD THAT THE PROSECUTION MAY NOT USE INCULPATORY STATEMENTS UNLESS IT DEMONSTRATES THE USE OF PROCEDUAL SAFEGUARDS EFFECTIVE TO SECURE THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION. MIRANDA v. ARIZONA, 384 U.S. 436(1966).

The Supreme Court of Ohio erroneously contends that the Miranda decision is applicable only to defendants accused of felonies and not those accused of misdemeanors. *State* v. *Pyle,* 19 Ohio St. 2d 64. No offense can be deemed "petty" where imprisonment for six months (as in the instant case) is authorized. *Baldwin* v. *New York,* 399 U.S. 66 (1970). Due process should not be subject to mere arithmetic progression. The *Miranda* warnings protect against the abuse of coerced confessions as utilized in this proceeding.

2. THE DECISION BELOW RAISES SIGNIFICANT DUE PROCESS PROBLEMS IN THE THE COURT SHOULD HAVE ADMITTED COLLATERAL FACTS FROM WHICH THE CENTRAL ISSUE, THE DEFENDANT'S LACK OF KNOWLEDGE OF THE ACCIDENT, MAY BE INFERRED AS A PROBABLE CONSEQUENCE.

The exclusion of evidence dealing, respectively, with the cost of repairs to the car of the witness allegedly struck by the accused, to the fact that it had been paid for by accused's insurer, and a newspaper article concerning the extraordinary number or accidents that night due to the weather was a denial of due process because these facts were material and relevant to whether a reasonable man would have knowledge of such an accident. *Hill* v. *State*, 14 Ohio L. Ab. 610 (1933), 21 Ohio Jur. 2d Evidence § 246.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted

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COUNSEL FOR PETITIONER

APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

No. C-73123

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

TIMOTHY O'CONNELL,
Defendant-Appellant.

DECISION

(Dated October 1, 1973)

Messrs. Thomas E. Luebbers and Michael S. Schwartz, 222 E. Central Parkway, Room 108-B, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. James W. Gustin, 601 Second National Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Municipal Court, the transcript of the proceedings, the assignments of error and briefs, oral arguments having been waived.

Appellant lists as his four assignments of error certain general propositions or affirmative statements of law. These are not, of course, assignments of error phrased or presented in any fashion that can be ruled upon by this Court. Thus, appellant's first assignment states:

> "Where a defendant is charged with a violation of Ohio Revised Code Section 4549.02 (leaving the scene of an accident) and the question of the defendant's knowledge of the accident is in dispute, collateral facts from which the existence or non-existence of the fact in issue, the defendant's knowledge of the accident, may be inferred should be admitted into evidence."

Whatever may be the virtue of this as an abstract statement of law, it does not point out wherein the trial court erred to appellant's prejudice. Since all of the assignments are similarly postulated, we are forced, in order to accord appellant a review of his trial, to scan the body of appellant's argument as an attempt to reframe his assignments of error into some reviewable form.

Under this first "assignment of error", appellant objects to the ruling of the trial court in sustaining appellee's objection to three instances of proffered testimony, or lines of examination, bearing, appellant argues, upon his absence of knowledge of the accident. We have examined the record in each of these cases (dealing, respectively, with the cost of repairs to the car of the witness allegedly struck by appellant, to the fact that it had been paid for by appellant's insurer, and a newspaper article concerning other accidents on the night in question), and find no error in the ruling of the trial court therein prejudicial to appellant. Appellant's first assignment of error is without merit.

Appellant's second and fourth assignments of error call into question whether judgment of the trial court was contrary to the manifest weight of the evidence, the second assignment being directed particularly toward the element of knowledge or *scienter* of the appellant. We have examined the record as a whole, and find credible and probative evidence to support every element of the offense charged. Indeed, we find the judgment of the trial court to

have been, under the facts adduced, inevitable. Appellant's second and fourth assignments are accordingly overruled.

Appellant's third assignment of error is phrased as follows:

> "Where a police officer uses coercive measures to obtain an alleged admission, such evidence should be excluded when the officer did not first advise the defendant of his rights under the Constitution."

Under this, appellant argues that the court erred in permitting the officer to testify over objection as to certain statements made by appellant during an interview following the accident. Appellant recognizes, in his argument, that *State* v. *Pyle*, 19 Ohio St. 2d 64, declined to extend the *Miranda* ruling to misdemeanor cases in Ohio, but argues that a caveat inserted therein by footnote as to coerced confessions, is applicable to the instant cause. However, since we are unable to discover the slightest suggestion in the record of anything remotely resembling the "coercive police interrogation methods" referred to in the footnote to the *Pyle* case, we are unable to find any error in the admission of the statements in question, all of which appear to have been freely given to the officer by the appellant. Appellant's third assignment of error is without merit.

It is, therefore, ordered by this Court that the judgment of the Hamilton County Municipal Court be, and the same hereby is, affirmed.

HESS, P. J., SHANNON and PALMER, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

THE SUPREME COURT OF OHIO

1974 TERM

To wit: February 1, 1974

THE STATE OF OHIO,)

City of Columbus.)

City of Cincinnati, Appellee, vs. Timothy O'Connell, Appellant.	No. 73-925 **Appeal from the Court of Appeals for Hamilton County**

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19...

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1974 TERM

To wit: February 1, 1974

THE STATE OF OHIO,)
City of Columbus.)

City of Cincinnati, Appellee, vs. Timothy O'Connell, Appellant.	No. 73-925 **Motion for an Order Directing The Court of Appeals for Hamilton County to Certify Its Record**

It is ordered by the Court that this motion is overruled. COSTS:

Motion Fee, $20.00, paid by James W. Gustin.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19...

..... Clerk

..... Deputy

JUN 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1633

TIMOTHY O'CONNELL,
Appellant-Petitioner.

vs.

STATE OF OHIO,
Appellee-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Where a police officer stopped a traffic offender for the purposes of discussing a 'hit-skip' auto accident involving the Defendant's vehicle results in the Defendant's voluntary response that he was the driver of the car, the admission of said affirmative response into evidence without objection is proper as being non-custodial and outside the scope of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966)	6
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IN THE

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October Term, 1973

NO. 73-1633

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vs.

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Appellee-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION TO AFFIRM OR DISMISS

The Appellee-Respondent moves the Supreme Court of the United States to dismiss the appeal herein, or, in the alternative to affirm the judgment of the Supreme Court of Ohio and the Court of Appeals of Ohio for the First Appellate District, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Ohio and of the Court of Appeals, First Appelate District of Ohio appear in Petitioner's Appendix thereto at pages seven through eleven respectively.

STATEMENT OPPOSING JURISDICTION

Jurisdiction does not lie with respect to the instant petition presented by Appellant-Petitioner for the reasons enumerated below:

a. Petitioner presents no statutory, factual or constitutional issues as a basis for granting certiorari.

b. The decisions rendered by the courts below with respect to the facts as presented in the case at bar are correct for there was no custodial interrogation nor confession elicited.

c. There was no objection raised by the defense at trial to the admission of instant petitioner's voluntary statements and thus waiver accrues notwithstanding the fact that said admission was voluntary.

Wherefore, Appellee-Respondent through a Motion to Affirm or Dismiss, herein contained moves this Honorable Court to dismiss Appellant-Petitioner's application for writ of certiorari, for lack of jurisdiction based upon the fact that the provisions of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), are not applicable to the case at bar.

QUESTION PRESENTED

Where a police officer stopped a traffic offender for the purposes of discussing a 'hit-skip' auto accident involving the defendant's vehicle results in the defendant's voluntary response that he was the driver of the car, the admission of said affirmative response into evidence without objection is proper as being non-custodial and outside the scope of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Ohio Revised Code, Section 4549.02, stopping after accident; exchange of identity and vehicle registration, are set forth in Appellant-Petitioner's petition at page two therein.

STATEMENT OF THE CASE

On December 11, 1972 the instant defendant struck another automobile with such force that the victim's auto was pushed over the curb into a pole on the sidewalk. The defendant did not stop to leave his name and address as required by statute but instead proceeded on. The victim had obtained the license number of the vehicle in question and had given this along with a description of the automobile to the police.

At trial the victim of the collision testified that the instant defendant later came to the place of business where the victim worked and identified himself as the defendant, Timothy O'Connell, also stating that he was the driver of the vehicle involved in the collision. The victim further testified at trial that a description of the defendant and the auto with the license number was given to the police. An in-court identification of the defendant was made by the victim at the trial.

Also testifying at trial was a police officer who observed the defendant's automobile bearing the exact license number as that reported to be involved in the 'hit-skip' auto accident. After observing this license number only a short period after the reported accident the officer stopped the vehicle in question.

The officer testified at trial that he asked the defendant "if he had been driving the vehicle within the last two hours?" The defendant stated to the officer, "Yes I have." The officer further asked the defendant if he had been at or near the intersection of the accident and Mr. O'Connell replied, "Yes, I think so." When asked by the officer if he was aware of an accident that had taken place at the intersection in question, the defendant stated, "maybe". Defendant also stated to the police officer that he "did recall an accident at this time." Instant defendant also indicated to the officer that he "didn't know why" he did not stop after the collision. Subsequently the police officer handed to the defendant a traffic citation to appear in court at a later date. No arrest was made.

The defendant also testified at trial that he was driving said auto at the time and location in question and that there were paint chips on his auto matching the color of the victim's vehicle. Defendant admitted at trial that the auto he was driving was heavily damaged after the collision.

At no time was there an objection by the defense to the testimony given by the police officer or by the victim of the accident. Subsequently petitioner at bar was found guilty of leaving the scene of an auto accident. After the trial the defendant admitted being previously convicted of "leaving the scene of an accident" in January of 1972 and also of drunken driving. Consequently, a presentence investigation was ordered by the court prior to sentencing.

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST.

Clearly, this case does not involve any constitutional issue but instead is merely a weight of the evidence question. The instant defendant did not deny involvement in the auto accident but only stated that he was not cognizant of the occurrence of the accident at the time it happened.

By the defendant's own admission at trial he testified that his vehicle was heavily damaged and contained paint chips from the other vehicle involved in the collision. The force of the impact of collision was so great that defendant's vehicle caused the victim's auto to crash into a pole located on the sidewalk.

The weighing of the testimony and credibility of the witnesses lies within the sole discretion of the trier of fact and where the defendant admits the accident but denies knowledge at the time of collision there can be no violation of any constitutional guarantee. The only issue concerns "scienter" which is a matter of fact to be proved at trial and the factual situation now before this Honorable Court does not demonstrate error.

The decision below is correct without regard for the questions sought to be raised by the petition and in view of all facts this case clearly does not warrant review by the Supreme Court of the United States. There is no substantial constitutional question herein involved and this case is not of great or general public interest as the very nature of the issues raised are not of constitutional magnitude.

REASON FOR DENIAL OF WRIT

I

WHERE A POLICE OFFICER STOPPED A TRAFFIC OFFENDER FOR THE PURPOSES OF DISCUSSING A 'HIT-SKIP' AUTO ACCIDENT INVOLVING THE DEFENDANT'S VEHICLE RESULTS IN THE DEFENDANT'S VOLUNTARY RESPONSE THAT HE WAS THE DRIVER OF THE CAR, THE ADMISSION OF SAID AFFIRMATIVE RESPONSE INTO EVIDENCE WITHOUT OBJECTION IS PROPER AS BEING NON-CUSTODIAL AND OUTSIDE THE SCOPE OF MIRANDA v. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602 (1966).

The police officer stopped the defendant because the vehicle in question matched the description and license number of the 'hit-skip' vehicle involved in an auto accident within the last hour. The defendant merely cooperated voluntarily and there is not even the slightest suggestion or testimony supporting an allegation of "in-custody" atmosphere.

Petitioner was never arrested and in fact was only given a traffic citation and was free to go at all times. Defendant freely and voluntarily admitted that he had been the driver of the auto and that he was in the area when the collision took place. When the officer asked the defendant if he was "aware of an accident that had occurred at said intersection", Mr. O'Connell replied "Maybe". Within the same conversation defendant admitted that he "did recall an accident at this time".

Applying the test of whether a reasonable man would consider his freedom seriously impaired it must be con-

cluded that the officer's brief and "non-coercive" inquiry of the defendant was not "custodial" and did not, therefore, require Miranda warnings. In order for inquiry absent an actual arrest to be "custodial," the police must manifest that they would not heed a request to depart. *U.S.* v. *Hall,* 421 F.2d 540, 545 (2 Cir. 1969), cert. denied, 397 U.S. 990 (1970).

In considering the totality of the circumstances:

1. There was a complete absence of restraint of petitioner's liberty;
2. The inquiry was routine and courteous in character;
3. The petitioner voluntarily cooperated with the police by freely admitting that he did recall the accident.
4. There was no interrogation or station-house questioning.
5. The inquiry was shortly after the accident took place.

there is absolutely no showing of facts which would warrant warnings under the Miranda requisites.

To recapitulate then, we have here a clear situation of a brief and non-coercive inquiry shortly after the occurrence of the traffic accident in an attempt to ascertain the surrounding circumstances. The facts of the case at bar are devoid of any hint of custodial interrogation for there was no deprivation of freedom. *Lowe* v. *U.S.,* 407 F. 2d 1391 (9 Cir. 1969).[1]

Furthermore, because an objection or motion has not been raised at the trial level and therefore waived, the

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[1] *Lowe* v. *U.S.,* 407 F. 2d 1391 (9 Cir. 1969), citing *Miranda* v. *Arizona,* 384 U.S. 436 at 444 (1966).

issues now sought to be raised upon appeal are not preserved.

Wherefore, in applying those standards as set forth in *Miranda,* it is evident that the responses of the defendant are of the type specifically excepted from the coverage of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966).

CONCLUSION

For the reasons set forth above, petitioner's writ of certiorari should be denied.

Respectfully submitted,

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